

# RACE, CITIZENSHIP, AND LAW IN AMERICAN LITERATURE

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## CHAPTER I

### *Higher law in the 1850s*

On March 11, 1850, William H. Seward, former Governor of New York and future Secretary of State under Abraham Lincoln, gave his first speech before the Senate. Seward's topic was Henry Clay's proposed omnibus compromise bill, which included admission of California as a free state and a new, more potent Fugitive Slave Law. As oratory, Seward's speech was something of an anticlimax after Daniel Webster's performance in favor of the compromise four days earlier. As the scholarly, bespectacled Seward carefully and undramatically read his speech, the galleries rapidly emptied. Indeed in substance as well as performance, much of Seward's speech was not particularly provocative. Seward complained that, by lumping together very different pieces of legislation, such as the admission of California and the Fugitive Slave Act, Clay's compromise bill prevented separate consideration of each measure on its own merits. Echoing a theme in Webster's March 7 speech, Seward dismissed John Calhoun's anti-compromise argument that California's admission as a free state unfairly disrupted the sectional equilibrium essential to the South's partnership in the Union. The Union was not, Seward contended, a joint venture between independent sections. Given the unexceptional nature of his opening contentions and his colorless performance, many of those leaving the galleries early must have been surprised to learn of the firestorm of criticism ignited by Seward's comments on slavery and the Constitution.<sup>1</sup>

Halfway through the speech, instead of joining Clay and Webster in the fraternal venture of saving the Union, Seward threw down a gauntlet on the issue most sharply dividing the country. He flatly denied "that the Constitution recognizes property in man" and asserted, in a phrase that became infamous, that the nation's charter must heed "a higher law." The sectional conflict necessitating Clay's compromise was, in Seward's words, "a convulsion resulting from . . . compromises of natural justice and of human liberty." The turmoil created by the South's aggressive

proslavery agenda and Northern capitulation had to be checked, not nurtured by further compromise. Seward predicted that the Fugitive Slave Law's manifest iniquity would inspire an expanding "public conscience," "transcending" party politics and sectional interests, to reassert (and more clearly define) the ethical basis of the American legal and political system.<sup>2</sup>

The higher law tradition invoked by Seward to read slavery out of the Constitution is complex and includes a wide range of formulations, but the core idea is constant and may be expressed (if not implemented) simply: to be legitimate, law must be just. Of course, slavery was defended as well as attacked on such terms. For example, George Fitzhugh argued that benevolently authoritarian institutions, such as slavery and marriage, represented the only moral way of addressing pervasive and apparently natural human inequalities. Sounding a similar note in defense of his compromise bill, Henry Clay characterized attempts to induce slaves to escape as a baffling and cruel disruption of an intimate and familial relation between servant and master. John Calhoun's compromise speech described the Constitution's recognition of slavery as a matter of trust; the North, in Calhoun's view, was attempting the morally contradictory feat of breaching its promises and simultaneously claiming superior moral authority for its duplicity.<sup>3</sup>

In contrast to his Southern opponents' attempt to fix higher law in divinely created hierarchies or timeless constitutional bargains, Seward cannily recognized both that a society's moral consensus delimits the scope and effect of its laws and that that consensus is mutable. Offending the basic moral norms of the Northerners among whom it was to be enforced, Seward argued, the Fugitive Slave Law was doomed before it was enacted – "Has any Government ever succeeded in changing the moral convictions of its subjects by force?" While Seward's conception that law derives its legitimacy from the dominant moral consensus did not necessitate the end of slavery (that such a consensus could well endorse slavery was all too plain in the nation's history), his sense that the culture's ethos was shifting in an antislavery direction would prove apt. And his version of higher law implied the important role literary and cultural figures could play in shaping the nation's jurisprudence by revising its public morality.<sup>4</sup> This implication was picked up by his critics. Seward was lambasted for opening constitutional jurisprudence to "the casuistry of theologians, the dicta of modern philosophers, and the suggestions of metaphysical theorizers." Higher law, *The Republic* charged, "gives [Seward] a scope as wide as the winds."<sup>5</sup>

"No portion of Gov. Seward's late speech . . . met with a wider or more unsparing condemnation," observed the New York *Tribune*, than the notion that constitutional doctrine could be governed by the nation's changing moral notions. Many Northerners and Southerners saw Seward as seeking to replace the rule of law with anarchy. Individuals following Seward's lead could, it seemed, simply pick and choose which laws they would obey, claiming that inconvenient laws were immoral. As the Richmond *Enquirer* put it, "The prominent idea set forth is, that the persons who fancy themselves aggrieved by the operation of a law they have sworn to respect and obey, can at any moment relieve themselves from the duty of obedience, and the responsibility of rebellion, by announcing that their conscience . . . forbids the compliance which the law demands." The *Democratic Review*, a conservative Northern journal, similarly exclaimed, "The principle announced by Mr. Seward, from his place in the Senate, and avowed by other leading abolitionists, recognizing a law superior to the Constitution, in interpreting that instrument, at once converts it into a dead-letter. The Constitution becomes obsolete. It is in fact abolished. It is a fanatical dogma; it is Mr. Seward's conscience." Such hyperbolic reactions substituted the straw man of anarchic and self-serving assertions of individual conscience (whether honest or fraudulent) for Seward's realistic acknowledgment that a democratic society's shifting mores undeniably affect the course and scope of its law. Seward was, after all, talking about the "public conscience," a weighty if amorphous entity not easily or quickly moved.<sup>6</sup>

The more germane fear aroused by Seward's higher law argument emanated from its universalist potential. Seward described the country not as a self-contained sovereign that could do as it pleased within its own borders but as "a part of the common heritage of mankind" "bestowed" and regulated "by the Creator of the Universe." Seward's speech implied an American government regulated by such universally acceptable "axioms in political science" as equality, knowledge, virtue, freedom, and government by consent – principles that on their face admit no distinctions of race, ethnicity, class, or gender.<sup>7</sup> In these facets of Seward's speech, many perceived the frightening vision of a cosmopolitan, heterogeneous American citizenry consensually arriving at norms of justice through a political discourse unbounded by such supposedly natural limits as race or gender. Thus, even though Seward was hardly the radical his political enemies made him out to be (he urged a Republican alliance with Stephen A. Douglas in 1858 and supported President Andrew Johnson's lenient version of Reconstruction) and despite the fact that

his speech framed its challenge to slavery with such conservative pieties as manifest destiny and white supremacy, many of his harshest critics quite presciently sensed that the consensual aspect of Seward's version of higher law would open the door to the scariest kinds of social and political innovation. Seward's higher law argument was associated with "European" reformers and socialists "flocking hither by thousands" and a parade of such horrors as racial amalgamation, socialism, and women's rights. Such cosmopolitan freethinking could be potentially fatal both to an identification of the nation with the Anglo-Saxon tribe and to a definition of the nation's governing ethos as the born-in-the-blood traditions of that tribe.<sup>8</sup>

What frightened some appealed to others. Like Seward, Frederick Douglass conceived of the higher law crisis facing the American republic in cosmopolitan terms. The glaring contradiction between the Constitution's foundation in higher law and the continued existence of slavery was not just an American problem but an impediment to global progress: "American Slavery blocks the wheels of the car of Freedom." Douglass saluted the influence of the foreign reformers, such as George Thompson, on American law and culture, and suggested a parallel between the internal stranger, the African American, and the external stranger, the foreign reformer. Both can bring an outsider's perspective to correct the provincial biases limiting American justice.<sup>9</sup> The cosmopolitan cast of Douglass's thoughts is not particularly surprising given the considerable relief from racial proscription he had experienced in Britain, the important support he received from British friends, and his cosmopolitan literary tastes, but it was also consistent with black abolitionism.<sup>10</sup> In 1835, for example, the Fifth Annual Convention for the Improvement of the Free People of Color unanimously resolved that the words "colored" or "African" as identifying terms were not appropriate given the universalist nature of their higher law argument. William Whipper's address at this convention is worth quoting at length for its anticipation of many of the themes of higher law arguments made by Seward and others for an antislavery reading of the Constitution:

Having placed our institution on the high and indisputable ground of natural laws and human rights, and being guided and actuated by the law of universal love to our fellow men, we have buried in the bosom of Christian benevolence all those national distinctions, complexional variations, geographical lines, and sectional bounds that have hitherto marked the history, character and operations of men; and now boldly plead for the Christian and moral elevation of the human race . . . We shall aim to procure the abolition of those hateful and unnecessary

distinctions by which the human family has hitherto been recognized, and only desire that they may be distinguished by their virtues and vices . . . We plead for the extension of those principles on which our government was formed, that it in turn may become purified from those iniquitous inconsistencies into which she has fallen by her aberration from first principles.<sup>11</sup>

A few months after Seward's speech, a committee of black Philadelphians adopted antislavery resolutions, echoing Seward's insistence that the Constitution be read as coherent with universal moral norms, his allusion to the image of "the panting fugitive," and his certainty that aiding fugitives from cruel bondage cannot be legitimately proscribed by law. And, in 1855, the Colored National Convention in Philadelphia expressly cited Seward's "higher law speech" as authority for its antislavery reading of the Constitution.<sup>12</sup>

Thus, while the prevalent reaction to Seward's higher law argument was one of outrage, it did find a sympathetic audience. The Anti-Slavery Society published ten thousand pamphlet copies of Seward's speech, and the New York *Tribune* lauded "Gov. Seward" for speaking

the word that Ages will embalm and Eternity approve. He has given the clearest and fullest utterance yet heard to the earnest, abiding convictions of the most generous, enlightened, humane and progressive portion of the American People – not yet a majority of the whole mass, but rapidly increasing in numbers and in strength – he has bodied forth in eloquent and impressive words the thought of that gathering.<sup>13</sup>

Seward's speech satisfied the increasing number of Northern Whigs who wanted someone in Washington to take a bold ethical stand against the perceived proslavery tilt of the national government. Many were particularly happy to see Webster admonished for his complicity in the Fugitive Slave Law. Such Whigs felt, as Merrill Peterson notes, that Seward had given the speech that Daniel Webster ought to have given.<sup>14</sup> In the wake of Seward's speech and the uproar it caused, a diverse collection of lawyers, poets, novelists, philosophers, preachers, and journalists were inspired to take up the higher law theme. When he heard higher law reckoned a kind of joke by lawyers and politicians, Emerson began taking notes on what he thought would become a treatise in defense of higher law jurisprudence. Ainsworth Rand Spofford, future Librarian of Congress, wrote a pamphlet laying out the rationale and authorities for a higher law approach to the Constitution, and William Hosmer wrote a book defending higher law jurisprudence. As was often noted, echoing Seward, the Fugitive Slave Law did good work in forcing Americans to



articulate with greater clarity what they held to be the moral basis of their political and legal system.<sup>15</sup>

Many sympathizers found Seward's speech irrefutable on the point that the public conscience, at least in the North, would not tolerate the Fugitive Slave Law. By transforming "hospitality to the refugees from the most degrading oppression on earth into a crime" while "all mankind [except slaveholders] esteem that hospitality a virtue," in Seward's words, the law created a searing moral crisis for Northerners imagining the moment when the shivering fugitive might appear at their door seeking comfort and aid. Even for those deeming abolitionists fanatical, the image conjured by Seward's speech seemed to pose an insuperable moral and psychological barrier to obedience. The law in the abstract might require such callous behavior, but actually getting good people to comply would be another matter. As the *Tribune* put it, "If Mr. Webster supposes that any mere legal morality can overrule that which God puts into the heart of every genuine freeman, he is much mistaken." No law, the *Tribune* asserted, could "make it the duty of Mr. Webster nor any other human being, when a panting fugitive presents himself at his door begging for shelter and the means of escape, to arrest and bind him and hand him over to the pursuers who are hot upon his trail . . . When public sentiment gets ahead of a law, that law loses all efficiency."<sup>16</sup> Henry David Thoreau found the Fugitive Slave Law's requirement that one "be the agent of injustice to another" to be such a profound violation of the moral foundation of law as to warrant breaking the law and stopping the machinery of government. Though he would "suffer much, sooner than violate a statute that was merely inexpedient," Theodore Parker declared, "when the rulers have . . . enacted wickedness into a law which treads down the inalienable rights of man to such a degree as this, then I know no ruler but God, no law but natural justice."<sup>17</sup>

That the barest sketch of the decent citizen forbidden by law from aiding the shivering fugitive could so powerfully reveal the moral nullity of the Fugitive Slave Law, in effect, created a special role for literary renderings of this jurisprudential crisis. A detailed narrative could, it seemed, definitively visualize the law's moral impracticability. Soon after Seward's speech, Harriet Beecher Stowe sought to fill this need with a short parable, "The Freeman's Dream" (August 1850), which proved to be a trial run for the fugitive slave scenes in *Uncle Tom's Cabin* (1852). In "The Freeman's Dream," Stowe imagines the Northern farmer who, faced with fugitive slaves seeking his aid, conforms to the law. Subsequently, he dies, meeting his fate in the form of an adverse divine judgment: "Depart from

me ye accursed! for I was an hungered, and ye gave me no meat." The farmer is condemned for choosing the lower law of men instead of the higher law of God. Explicitly weighing in on Seward's side of the argument, Stowe's story censures those "who seem to think that there is no standard of right and wrong higher than an act of Congress, or an interpretation of the United States Constitution."<sup>18</sup> Even if the Fugitive Slave Law were not reversed by the top-down processes of legislative or judicial action, it could, it seemed, from the higher law perspective, be upended by the contrary moral consensus mobilized in part by such cultural interventions as Stowe's antislavery fiction. Once fully aroused by a cultural/political partnership of literary figures, abolitionists, journalists, philosophers, preachers, politicians, and lawyers, this consensus hopefully would bring the nation's law in line with its higher law ethos.

The measure of success that such higher law advocacy had is suggested in an 1864 *North American Review* article, "The Constitution and its Defects." The article notes that during the first decades of the nineteenth century "the work of testing the morality of national legislation by the application of fundamental principles was abandoned by the leading minds of the country." But looking back from 1864, one felt ashamed by "the general contempt and ridicule excited . . . by appeals to the 'higher law'" which only betokened the simple truth that

government is after all a conventional arrangement, entitled, no doubt, to the utmost respect, and not to be disturbed unless it plainly fails to answer the purpose for which it was instituted; but that cases may arise, not calling for revolution, in which justice and truth are so outraged, under color of law, that it becomes the duty of good citizens to be guided rather by the principles of morality, on which the law ultimately rests all its claims to obedience, than by the law itself.

Given the "general contempt and ridicule" meeting Seward's appeal to higher law in 1850, we should pause to ask why he thought (correctly as it turned out) that his argument would fly. A brief examination of Seward's precedents answers this question and illuminates the concepts central to higher law's resurrection in the 1850s.<sup>19</sup>

#### HIGHER LAW PRECEDENTS

For Seward's generation, the touchstone for higher law reasoning was the American Revolution. At the risk of oversimplification, one could assert in 1850 (or now for that matter) that, because the founding fathers

justified their defiance of English law on moral grounds, higher law constitutes the ultimate critique and authorization of the American legal system. Higher law appears throughout early American political theory, which, following Rogers Smith's magisterial study *Civic Ideals*, can be usefully separated into three general categories: the republican tradition emphasizing civic virtue or the renunciation of individual interests for the good of the community; the liberal tradition stressing the protection of individuals' rights against government incursion; and an egalitarian ascriptive tradition, as Smith terms it, defining the American political ethos of both the republican and liberal natural rights varieties as the natural inheritance of a mythic Anglo-Saxon or American race.<sup>20</sup> Higher law conceptions run through all three of these theoretical perspectives, and higher law is central to three additional themes in early American political culture. The first of these is the religious vision of America as a "redeemer nation" illuminating for the world the ideal of righteous government. The second is the related belief in human progress. And the third is an incipient cosmopolitanism appearing in certain discussions of the American Revolution and the Constitution.

Overlaying and connecting the first five of these six aspects of early American political thought is a triangular relation between *conscience* (the repository of ethical concepts, such as the republican notion of public virtue or the liberal tradition of inalienable rights, that legitimate or limit law), *consent* (the democratically formed consensus about the ethical basis of law), and *resemblance* (an insistence on racial and cultural similitude circumscribing the application of the first two principles). Focusing on one aspect of American political thought to the neglect of the others (e.g., the liberal tradition's emphasis on individual rights) occludes the triangular pattern linking these different points of emphasis. And without having this interrelation of conscience, consent, and resemblance in focus, one tends to miss or devalue the cosmopolitan dimensions of American political thought. The loss is considerable, as cosmopolitanism has the potential to sever conscience and consent from resemblance, making it both the most threatening and most vulnerable of political conceptions. Its presence is fleeting and its moments of great political and cultural influence are rare, yet, for many, it defines the nation's promise. In their cosmopolitan moments, the framers conceived of American political discourse as a medium through which the evolving moral consensus of a heterogeneous people could take constitutional form. In "The Origin of Government and Laws in Connecticut" (1798), Jesse Root

found the validity of the common law to be based on “unwritten customs and regulations” that have the “sanction of universal consent.”<sup>21</sup> The requirement of universal consent, far from being a hopelessly utopian ideal, is basic to the project of building an inclusive political discourse. Lincoln would proclaim the requirement of universal political consent as the “sheet-anchor of American republicanism,” and his statement, “No man is good enough to govern another without that other’s consent,” became a kind of higher law motto for the first president of the NAACP, Moorfield Storey, who, like his predecessors, Ralph Waldo Emerson, Frederick Douglass, and Charles Sumner, found in the framers’ occasional cosmopolitanism the antithesis of identity as politics.<sup>22</sup>

#### THE REPUBLICAN TRADITION

For the generation authoring the Civil War amendments, the Revolution showed how higher law inspiration can become consensus and how consensus can compel a revision of the polity’s fundamental law. The suggestion by Seward and others that Americans bear a collective responsibility to ensure that their legal system comports with higher law derives from the early republicans’ conception of civic virtue. Severing ties with England did more than get rid of a king and serve the self-interests of the colonists; it advanced the establishment of a just form of government.<sup>23</sup> And this new republic depended on the reciprocal influence of the citizenry’s moral character and their government’s ethical nature. As John Adams put it, republican government

introduces knowledge among the people, and inspires them with a conscious dignity becoming free men; a general emulation takes place, which causes good humor, sociability, good manners, and good morals to be general. That elevation of sentiment inspired by such a government, makes the common people brave and enterprising. That ambition which is inspired by it makes them sober, industrious, and frugal.<sup>24</sup>

And a virtuous citizenry, educated by their participation in a republican form of government, would, in turn, assure the virtue of the government. In *The Rights of the British Colonies Asserted and Proved* (1764), James Otis declared that, when confronted by immoral laws, a citizen’s inaction and silence is shameful. Republicans predicted that the political deliberations of citizens duty-bound to maintain the ethical quality of their government and the reciprocal and salutary influence of that form of government on their deliberations would reveal new paths of political virtue obscured

by past errors and, paradoxically, recover the lost democratic innocence of an Anglo-Saxon past.<sup>25</sup>

Instead of inherited station and power, early republicans offered a mix of ethics and democratic consensus as the basis for and mechanism of virtuous government. As James Otis put it, a just form of government is not founded on mere "*compact or human will*." It is grounded ultimately on the "*unchangeable will of God*, the author of nature, whose laws never vary." This divine law directs human government to serve "the *good* of mankind," but, as Otis notes, God leaves the implementation of this edict to us: "The form of government is by *nature* and by *right* . . . left to the *individuals* of each society." The upshot of this human discretion is that government, though not founded on any mere contract, turns out in practice to be founded on a particular kind of consensus as to the form of government and law that comes closest to securing "the *good* of mankind." Otis's comments capture the way in politics (if not in religion) higher law reasoning begins with an idea of bright-line moral absolutes but, because God or Nature leaves the practical details to human beings, takes its form and effect in the mutable realm of consent. Tories responded to the republican substitution of conscience and consent for an inherited hierarchical arrangement of status, property, and power much as proslavery advocates would later respond to the higher law arguments of antislavery advocates. They claimed that such an approach would unleash social anarchy – "the bands of society would be dissolved, the harmony of the world confounded, and the order of nature subverted."<sup>26</sup> What gave the republicans confidence that the sky would not fall upon their new consensual world order?

Two social ingredients made the republican mix of conscience and consent seem practicable to the revolutionary generation (and many of their antebellum heirs). The first was the notion that the commonwealth was an organic community whose interests and outlook were generally homogenous. As Garry Wills describes, Thomas Jefferson suspected that "a certain homogeneity was necessary in any society of men contracting with each other on the basis of mutual affection." The Declaration's figure of "one people" implicitly drew on a myth of Anglo-Saxon liberty deeming the Americans' capacity for self-rule as a shared racial heritage. In asserting their constitutional liberties, British colonists, in James Otis's view, recovered a family tradition: "liberty was better understood and more fully enjoyed by our ancestors before the coming in of the first Norman tyrants than ever after."<sup>27</sup> It followed from the assumption of a shared heritage and organic unity that what was good for the whole

was good for the part, and, reflecting the egalitarianism of this political theory as well as the fiction of homogeneity, any part could represent the whole in a kind of elemental civic fungibility.

The second factor favoring the republican politics of conscience and consent was humankind's innate moral sense. The theory developed by such eighteenth-century philosophers as the Earl of Shaftesbury, Joseph Butler, Frances Hutcheson, David Hume, and Adam Smith that humanity is universally endowed with a benevolent form of moral intuition decisively influenced revolutionary era republicanism and antebellum higher law arguments against slavery. These philosophers felt that Locke had overemphasized rationality in describing the mind's processes. Locke's concept of right reason – an empirical calculus of sense impressions and inductive extrapolations – was incomplete. It left out the emotional and aesthetic aspects of human nature. Human beings were inherently capable of deriving exquisite happiness and pleasure from the self-sacrifice that for republicans constituted public virtue.<sup>28</sup> For Jefferson and other republicans, the possession of a sympathetic moral sense defined humankind. Following Hutcheson, Hume, and Smith, Jefferson found that “nature hath implanted in our breasts a love of others, a sense of duty to them, a moral instinct, in short, which prompts us irresistibly to feel and to succor their distresses.” The moral instinct, in the words of an anonymous Boston pamphlet writer, made “[t]he happiness of every individual” depend “on the happiness of society.” As Richard Sennett puts it, “what people shared was a natural compassion, a natural sensitivity to the needs of others, no matter what the differences in their social circumstances.”<sup>29</sup> That such a benevolent moral faculty was innate to the entire populace, from the ploughman to the professor, in Jefferson's famous phrase, supported the founders' confidence in the citizenry's ability to create and sustain an ethical form of government. Dedicated amateurs, these early republicans wanted no professional army to fight their battles and no professional legal or political class to make their laws.<sup>30</sup> Republican moral sense theory empowered the average citizen to judge fundamental questions of political legitimacy and recognized the relevance of literary, religious, and philosophical works, illuminating the dictates of fellow feeling. As Robert Ferguson has shown, the lack of sharp disciplinary boundaries between various kinds of legal and cultural discourse corresponded with the framers' conception that the attempt “to form a more perfect union” was a hybrid act of imagination.<sup>31</sup>

Of course, given the divergence of different individuals' affective responses, one might well wonder at the founders' belief in the possibility of

ethical consensus. In addressing this issue, early republicans and their antislavery descendants could draw on the relation moral sense psychology charted between the affect provoked by an immediate experience and that produced by contemplation of the common good. David Hume's influential account of this relation begins by acknowledging that our moral sense responds most ardently to the people and events nearest to us both in terms of human relation and in terms of physical experience. Of particular import to this agency of moral affect are the "lively idea[s]" we have "of everything related to us": in particular, the "human creatures . . . related to us by resemblance." (As one might anticipate, the idea that moral affect originates in resemblance complicates certain abolitionist invocations of moral sense theory, such as *Uncle Tom's Cabin*.)<sup>32</sup> However, notwithstanding their power, our affective preferences for the proximate coexist, in Hume's view, with a rational acceptance of those rules enabling a society of individuals with diverse interests and relations to coexist peacefully and productively. For Hume, the "three fundamental laws of nature" on which "peace and security of human society entirely depend" are the right to own and sell property and the binding nature of our voluntary commitments.<sup>33</sup> Unlike the innate affective responses of the moral sense, these basic norms of social coexistence are matters of consensus and natural only in the sense that people inevitably invent them when they "observe, that tis impossible to live in society without restraining themselves by certain rules." Once recognized by rational self-interest, however, such conventions have an affective dimension of their own, affording pleasure because they "tend to the peace of society." Through a process of political education about and participation in creating the legal conventions and rules requisite for society's peaceful existence and progress, we are led from the more intense and immediate affective response one feels at the sight of a friend or relative in dire straights to a shared pleasure in discovering that certain rules are good for society.<sup>34</sup>

#### RIGHTS

Gordon Wood has argued that republicanism expired with the framers' focus protecting divergent individual interests. Finding republican themes and tropes continuing into the nineteenth and twentieth century, J. G. A. Pocock counters, rightly I think, that Wood overstates the end of republicanism.<sup>35</sup> Indeed, such a terminus would be hard to locate given the permeability of the division between republicanism and

the liberal natural rights tradition. Because both theories attempt to articulate the ethical consensus legitimating American government and law, there are many points of overlap and intersection between them.<sup>36</sup> The difference is chiefly a matter of emphasis. Where republican theory stresses the coherence between the republic's official jurisprudence and the shared ethos of the citizenry, liberal theory imagines an opposition, focusing on those most basic rights all agree should protect the individual from the government.

The idiom of rights was, as Jack Rakove has pointed out, as natural to the colonists as the republican language of public virtue. First and foremost, the colonists conceived of rights as an essential bulwark against the predations of power. Power was aggressive; it has "an encroaching nature"; "if at first it meets with no control [it] creeps by degrees and quick subdues the whole." Foreshadowing Simon Legree, who tells Uncle Tom to feel his hand made "hard as iron from *knocking down niggers*," colonists figured tyranny as "the hand of power," "grasping" and "tenacious," "what it seizes it will retain."<sup>37</sup> Rights, by contrast, are not something graspable but are, in John Dickinson's words, "born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice."<sup>38</sup> Significantly, *rights* denotes a protected sphere of personal autonomy and liberty whose precise shape and dimensions are unspecified. To amplify the term by referring to life, liberty, and the pursuit of happiness does not really resolve the ambiguity (the familiar triad does not, for instance, tell us how to adjudicate conflicts between different people exercising their "rights"). This ambiguity is both the product of and predicate for the continuing cultural and political dialogue through which American society frames and revises its notions of basic individual freedoms.

Perhaps more than any other philosopher, John Locke taught the revolutionary generation how applying "right reason" to sense experience reveals the original equality of people and their rights to life, liberty, and property.<sup>39</sup> And Locke offered a compelling philosophical conception of human beings in a state of nature consensually forming the basis and nature of their government.<sup>40</sup> Thomas Paine's *Common Sense* (1776) begins with a Lockean narrative of "a small number of persons settled in some sequestered part of the earth" who, like the first people on earth, find that in "a state of natural liberty . . . society" is, as a matter of necessity, "their first thought." As the creation of their consent, the very existence of this primitive society attests to the members' inherent



and equal authority. The fact that, in creating civil society, each citizen ceded some authority to the government required a distinction between the rights of self-governance that could be alienated (initially by means of the social compact and subsequently by means of the governmental charter) and the individual rights that could not be alienated (rights of life, liberty, and property). The latter signify the continuing authority of the individual to endorse and later revise the governmental charter. For the framers, the Revolution had left the American people in a state of nature, and the proper goal of drafting and ratifying a constitution was a social compact not between ruler and ruled but among citizens who had banded together to promote the welfare of the whole. To this end, the delegates to the constitutional conventions were not drawn from standing state legislatures but directly elected by the people.<sup>41</sup>

The Lockean account of natural rights, as Richard Tuck notes, differed from most rights theories, which “have been explicitly authoritarian rather than liberal.”<sup>42</sup> In Locke’s view, such conservative political theory boiled down to the assertions that “*all Government is absolute Monarchy*” and “*no Man is Born free*.” Locke’s American heirs similarly rejected conservative conceptions of law as merely the expression of the sovereign’s power. In response to the emergent positivism of British jurisprudence, which classed the British constitution not as an expression of higher law, but as just another, though more basic, form of positive law, American Whigs reaffirmed the higher law notion that certain basic and universal values, including the protection of individual rights, either legitimated government or invalidated it.<sup>43</sup> The doctrine of judicial review exemplified the practical force the earliest citizens were willing to give to their conceptions of higher law. In contrast to the British system, in which, as Blackstone described it, “no power could control” even the unreasonable enactments of Parliament, judicial review gave American judges the authority to curb the excesses of majority power by voiding legislation contrary to the principles of justice expressed in the Constitution.<sup>44</sup> The dichotomy colonial republicans perceived between the nobility of the unwritten British constitution and such unjust and arbitrary acts of Parliament as the Stamp Act and the Townshend Acts came to correspond in American jurisprudence with the distinction between what was constitutional and what was merely legal. *Constitutional* meant something better than and anterior to mere law. The Bill of Rights and the Preamble’s stated goals of establishing justice, promoting the general welfare, and securing the blessings of liberty embodied the ethical basis of the new republic in contrast to the edicts of shifting legislative majorities, which often expressed

merely the self-interest of a particular political coalition. This sentiment animates Chief Justice John Marshall's famous distinction between the Constitution and a code.<sup>45</sup>

#### RESEMBLANCE: IDENTITY AS POLITICS

As Rogers Smith has pointed out, following Edmund Morgan and Reginald Horsman and others, the republican and rights traditions were alloyed with and limited by a prerequisite that the members of the body politic must resemble each other in language, culture, religion, and appearance. The ascriptive side of early American conceptions of higher law is well captured by Jefferson's proposal for the Great Seal of the United States. John Adams told his wife that Jefferson's seal had on one side "the children of Israel in the wilderness, led by a cloud by day and pillar of fire by night; and on the other side, Hengist and Horsa, the Saxon chiefs from whom we claim the honor of being descended, and whose political principles and form of government we have assumed." Adopting the Exodus story, the seal's first side would seem to embody the moral universal of freedom and the millennialist mission of the American republic in a symbol that superficially, at least, cuts across race lines, but the seal's flip side reverses the thrust of the symbolism to represent the ethos animating the new American government as the racial legacy of a certain tribe.<sup>46</sup>

This ascriptive tendency can be felt in a subtler fashion in Thomas Paine's touting of the imminent "birthday" of a new, more diverse "race of men." Not limited to British descendants, Paine's new "race" included immigrants from different parts of Europe but excluded blacks and Indians. Similarly, J. Hector St. John de Crèvecoeur's famous letter, "What is an American," lauds America as an "asylum" for "the poor of Europe" yet recasts a limited assortment of northern European immigrants as a new homogenous society closely tied to the soil.<sup>47</sup> In Paine and Crèvecoeur, one can feel the outward push of an incipient cosmopolitanism being contained by what each man senses is the outer limit of an indispensable form of social resemblance. Even such open-minded figures as James Otis and James Wilson were influenced by ascriptive thinking. Otis insisted that "righteousness must be the basis of law" but identified the colonists "not as the common people of *England* foolishly imagine . . . a compound mixture of *English*, *Indian*, and *Negro*, but [as] freeborn *British white* subjects." In his "Lectures on Law" (1790), James Wilson, one of the Constitution's more cosmopolitan framers (a Scottish immigrant

himself), followed Jefferson in describing the basic structure of Anglo-American constitutionalism as a Saxon legacy.<sup>48</sup> Of course, the ascription of democratic principles to a British lineage does not necessarily indicate an acceptance of slavery or disfranchisement of black Americans. Otis identified liberty as the heritage of an Anglo-Saxon people but also accepted that all “colonists, black and white, born here, are free born British subjects,” and Wilson was a staunch opponent of slavery.<sup>49</sup>

#### RELIGION

The higher law doctrine that, in the words of Martin Luther King, Jr., “an unjust law is no law” has a long lineage in religious thought, including St. Augustine, Aquinas, John Calvin, Thomas Hooker, Jonathan Edwards, and many others. Aquinas’s conception is paradigmatic: higher law is the body of eternal principles of justice promulgated by God; natural law represents that part of God’s eternal law ascertainable by human beings through the use of their reason; human law which conflicts with higher law is void *ab initio* (from the beginning).<sup>50</sup> The early republicans’ notion of higher law was deeply influenced by the Puritan insistence on a present God, appearing in nature, historical events, and the “actual pattern of reality to which revelation had given the key and which reason, following upon revelation, could discern.” The failure to conform the rules and processes of human government to God’s law betokened earthly disorder and rebellion. Preachers in the revolutionary era drew upon this intersection of religion and politics to derive the right of revolution from the conflict between the higher law of God and the lower law of humankind.<sup>51</sup>

Contrary to the tenor of its title, Charles Chauncy’s sermon, “Civil Magistrates Must Be Just, Ruling In The Fear Of God” (1747), demonstrates that an ethical or religious view of law need not speak from an absolutist clarity to announce a static legal order. Foreshadowing Ronald Dworkin’s distinction between concepts and conceptions (concepts are large principles never fully or finally defined, such as fair play, and conceptions are our specific attempts to achieve and illustrate those abstractions, such as a legal prohibition on a specific kind of discrimination), Chauncy contends that

a distinction ought always to be made between government in its general notion, and particular form and manner of administration. As to the later, it cannot be affirmed, that this or that particular form of government is made necessary by

the will of God and reason of things. The mode of civil rule may in consistency with the public good, admit of variety: And it has, in fact, been various in different nations: Nor has it always continued the same, in the same nation.<sup>52</sup>

The movement in Chauncy's sermon between divine principle (universal and certain) and human implementation (diverse and experimental) corresponds to the merger of religious inspiration and Enlightenment rationalism one often finds in the founders' political rhetoric. For instance, in "A Dissertation on the Canon and Feudal Law" (1765), John Adams finds that tyranny and injustice abate where "knowledge and sensibility have prevail'd among the *people*." But, as Ernest Tuveson points out, Adams's tone oscillates between rationalism and the religious language of the apocalypse, which Tuveson aptly terms "apocalyptic Whiggism." In Adams's apocalyptic Whiggism, the establishment of a republican form of government in America heralded the millennial advance for humankind and the end of the dominant corruption and oppression fostered by the Roman church.<sup>53</sup>

While the founders' coupling of inspiration and reason would prove to be an important prototype for politically oriented higher law arguments against the constitutionality of slavery, millennialist aspirations and Enlightenment rationalism were not always blended in the fashion of Adams's "Dissertation." Religious higher law arguments against slavery sometimes spurned law and politics altogether. Adopting a Christian anarchism, Garrisonians believed that human government should not be substituted for a government by God. In 1836, Henry C. Wright, a Congregational pastor from West Newbury, Massachusetts and the most anarchistic of antislavery radicals, wrote in his journal that "God has a Government & Man has a government. These two are at perpetual *War* . . . Man is not content to rule over the animal creation. He would get dominion over man. He tries all arts to obtain this end. *I regard all Human Government as usurpations of God's power over Man.*" Arguing for God-directed self-control as the true source of public order and dispensing with the messy and uncertain processes of political argument and compromise, William Lloyd Garrison's conception of government stressed conscience and moral absolutes, not consent and human experiment.<sup>54</sup> Predictably, the pattern of Garrison's influence did not follow the script of his argument. As Eric Foner notes, Garrisonian argument had considerable influence on the politics of antislavery and eventually on the formation of the Republican party. Many politicians, such as Salmon Chase, Charles Sumner, Thaddeus Stevens, and Joshua Giddings, drew on Garrisonian

representations of moral inspiration and the millennialist destiny of the American nation as the starting point for cultural and political debate about the just direction of constitutional jurisprudence.<sup>55</sup>

#### PROGRESS

The nineteenth century was, as many have observed, dominated by the idea of progress. George Bancroft made progress a central theme of his massive *History of the United States*, and Francis Lieber described American jurisprudence as a slow but steady process of upward evolution.<sup>56</sup> Foreshadowing the proto-pragmatist intuition shared by Charles Sumner, Frederick Douglass, Ralph Waldo Emerson, and others that the Constitution was capable of *becoming* antislavery, Jefferson expressly coupled the concept of progress and the Constitution. In his famous letter to John Adams on the “natural aristocracy,” Jefferson contends that our awareness of the progress we have already made (e.g., by eliminating the legal preservation of inherited status through such doctrines as primogeniture and entails) should direct our approach to law:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment . . . I am certainly not an advocate for frequent and untried changes in laws and constitution. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>57</sup>

As anticipated by Charles Chauncy, Jefferson allows for intellectual and moral progress to continue to shape and reshape the Constitution, creating, in effect, a notion of constitutional progress. The revolutionary generation’s concept of progress provided a template for antislavery arguments seeking to combine moral inspiration and rational debate in a flexible constitutional jurisprudence capable of opening up the terms of citizenship and basic justice to black Americans.

## COSMOPOLITANISM

Looking back at the two chief prerequisites for republican confidence in conscience and consent – a homogeneous community and an innate moral sense – the contradiction between the identitarianism of the former and the universalism of the latter would seem readily apparent. While certainly not invisible to the founders, this contradiction was neither as plain nor as central as it would seem to later generations.<sup>58</sup> Because the founders argued for universal values, such as liberty and equality, on behalf of a people they imagined as generally similar in origin and culture, they did not have to cross the Rubicon of racial difference. Higher law arguments on behalf of black Americans could not avoid the issue. Sumner, Douglass, Emerson, Thaddeus Stevens, and certain other farsighted individuals found the answer to this conflict in American jurisprudence by severing the higher law universals of conscience and consent from the notion of racial and cultural resemblance. Ironically, the antecedent for this radical turn of antebellum higher law argument resides in the reverse side of the framers' identitarianism: their nascent cosmopolitanism.

This paradox can be traced back, at least in part, to moral sense psychology. While, according to Hume, we feel first and most strongly for those who seem like us, we are led from the immediate circle of proximate events and close relations outward to a more inclusive and abstract appreciation of the social good. Like Hume, Adam Smith accepted that humankind is endowed with a benevolent moral sense that feels "for others." Sympathy, for Smith, revealed the "natural jurisprudence" or moral direction of government to which "[e]very system of positive law" should aspire. Following his Stoic precursors, Smith's conception of sympathy had an expressly cosmopolitan aspect:

Man, according to the Stoics, ought to regard himself . . . as a citizen of the world, a member of the vast commonwealth of nature. To the interest of this great community, he ought at all times to be willing that his own little interest should be sacrificed. Whatever concerns himself, ought to affect him no more than whatever concerns any other equally important part of this immense system. We should view ourselves, not in the light in which our own selfish passions are apt to place us, but in the light in which any other citizen of the world would view us.

The innate and natural concern for others, in Smith's view, expanded outward from family and tribe to the nation and the globe. We can hear an echo of this cosmopolitan ethical perspective in the Declaration of

Independence, which “declar[es] the causes” for the Revolution out of “a decent respect to the opinions of mankind.”<sup>59</sup>

Thomas Paine’s *Common Sense* offers a similarly concentric pattern of enlargement of moral outlook to explain how colonials of diverse backgrounds can band together and form a new people:

A man born in any town in England divided into parishes, will naturally associate most with his fellow-parishioners (because their interests in many cases will be common) and distinguish him by the name of *neighbour*; if he meet him but a few miles from home, he drops the narrow idea of a street, and salutes him by the name of *townsman*; if he travel out of the country, and meet him in any other, he forgets the minor divisions of street and town, and calls him *countryman*, i.e. *countryman*; but if in their foreign excursions they should associate in France or any other part of *Europe*, their local remembrance would be enlarged into that of *Englishmen*. And by a just parity of reasoning, all Europeans meeting in America, or any other quarter of the globe, are *countrymen*; for England, Holland, Germany, or Sweden, when compared with the whole, stand in the same places on the larger scale, which the divisions of street, town, and country do on the smaller ones; distinctions too limited for continental minds. Not one third of the inhabitants, even of this province, are of English descent. Wherefore I reprobate the phrase of parent or mother country applied to England only, as being false, selfish, narrow, and ungenerous.

Though limited by the principle of difference central to resemblance and identity as politics (English identity dissolves into European identity and European identity dissolves into American identity but the distinction of “us” versus “them” remains pivotal), the telescopic movement toward a global prospect is, in Paine’s view, helpful for the task of forging an American identity in terms of political faith, not national origin. The colonists’ varied ancestry will, Paine hopes, help to prevent kinship ties from obscuring their common cause against British tyranny, but, he adds, even if all were of British descent, the blood bond would mean nothing in the face of the political differences separating the colonies from Britain. In keeping with its cosmopolitan mixture, Paine suggests that international exchange and commerce be America’s “plan.” The antithesis of a stagnant filial devotion to Britain, such commerce, through nurturing multiple international connections, would appropriately foster the growth and development of an already diverse people.<sup>60</sup>

The cosmopolitan tendency of the founders’ political outlook enters constitutional jurisprudence in the Federalists’ countermajoritarianism. In *The Federalist*, Number 10, James Madison famously targets the problem of malign majorities – “factions” – enacting laws that serve their